NO. 83-2161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF MONTANA, et al.,

Petitioners,

-vs-

BLACKFEET TRIBE OF INDIANS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, IDAHO, NEVADA AND NORTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the prior congressional grant of taxation authority to the states under the Act of May 29, 1924, 43 Stat. 244 (25 U.S.C. § 398) survive the passage of the Indian Mineral Leasing Act of 1938, Act of May 11, 1938, 52 Stat. 347 (25 U.S.C. §§ 396a-396g) vis a vis mineral leases entered into after May 11, 1938?

INTEREST OF THE AMICI CURIAE

The amici curiae states are vitally interested in reducing, if not eliminating, the confusion, frustration and expense of litigation that will inevitably be forthcoming in the absence of a resolution by this Court -- one way or the other -- of the substantial and significant issue presented. The continued propensity of courts in the various federal circuits to render opinions on questions of the nature involved herein in a conflicting and often internally inconsistent manner merely exacerbates an already difficult situation.

Beyond this crucial interest, the amici curiae states are concerned over matters of certainty in the

availability (or unavailability) of tax revenues, which monies will be used for the benefit of all their peoples, Indian and non-Indian alike. For example, in the case of the amicus curiae State of Arizona, the uncertainties characterizing the circuit court's majority opinion may have substantial impact upon currently-pending litigation involving in excess of $25,000,000.

The amici curiae states strongly urge this Court to grant the petition for a writ of certiorari in order to dispositively answer the questions raised, thereby, hopefully, eliminating the need for more and more complicated litigation in an area already saturated with uncertainty.

ARGUMENT

The Ninth Circuit decision relies heavily upon this Court's ruling in Bryan v. Itasca County, 426 U.S. 373 (1976) and a 1977 decision of the United States Department of Interior, 84 Int. Dec. 905.

In Bryan, supra, this Court held that the grant of civil jurisdiction to the states under § 4 of Pub.L. 280 (67 Stat. 589, 28 U.S.C. § 1360) did not constitute a congressional grant of power to the states to tax reservation Indians on their reservations. This Court enunciated the principle, 426 U.S. at 393, that doubtful expressions in statutes should be resolved in favor of Indians, particularly in the face of claims that "ambiguous statutes abolish by implication Indian tax immunities...," citing, inter alia, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174, (1973).

In further support of this proposition, this Court relied upon language from the dissent (Murphy, J.) in Oklahoma Tax Commission v. United States, 319 U.S. 598, 613-614 (1943), quoting, 426 U.S. at 392:

"This is so because ... Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow the states to treat Indians as part of the general community."

It is important to note at this juncture that Justice Murphy's dissent in Oklahoma Tax Commission v. United States, supra, makes two additional crucial observations.

First, the antecedent language to which the introductory words "...[T]his is so because..." referred to in the foregoing quote from the dissent are as follows, 319 U.S. at 613:

"There can be no doubt of Congress' plenary power to exempt Indians and their property from state taxation.

. . . .

"To deny such constitutional power is to deny the presupposition of all legislation relating to Indians as well as an unbroken line of decisions

on Indian law in this Court and all that underlies them. This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field. Therefore, so far as the power of [a] state to tax Indian property is concerned, ... a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation." (Emphasis added)

It is therefore apparent that, from Justice Murphy's perspective, if, but only if, Congress expressly demonstrates a clear intention to permit state taxation of Indian interests will such a power be recognized.

Here, there can be no serious dispute that 25 U.S.C. § 398 contains just such an expression of

congressional bestowal upon the states of the power of taxation upon the terms described therein.

Wholly apart from that, once such a power is recognized, it is intellectually inconsistent to conclude, as does the circuit court's majority opinion herein, that something other than a clear and unequivocal repeal, abrogation or supersession of such grant by Congress will suffice to void the previously granted power. As the dissenters correctly point out (729 F.2d at 1207), if Congress had intended to limit the tax authorization of the 1924 Act, it would have done so expressly. Quite simply, while no such showing has or can be logically made upon the facts of this case, the circuit court's majority opinion, if allowed to become final, will stand for this very proposition. Such a result would be most unprecedented and unfortunate.

The second critical observation from Justice Murphy's dissent, insofar as the present case is concerned, is found in footnote 11 thereof. The text supporting that footnote observes, 319 U.S. at 619:

"...[E]ven when permitting specified forms of state taxation of restricted Indian property, Congress has significantly provided in numerous statutes that no tax lien should attach." (Emphasis added)

Footnote 11, with a "see" prefatory signal (i.e., declaring that the cited authority constitutes basic source material that supports the stated proposition), lists five examples of congressional enactments "...permitting specified forms of state taxation of restricted Indian property...." The fourth example of such a specific "...grant by Congress of the withdrawal of the immunity of Indian property from state taxation...." (Murphy, dissenting, 319 U.S. at 613, supra), is the very statute which the circuit court opinion ruled had been "replaced" as of, and for all periods subsequent to, May 11, 1938: 25 U.S.C. § 398.

The significance of this fact is clear. The circuit court opinion, handed down in April, 1984 (46 years after 1938), proceeded upon the assumption that congressional silence with regard to state taxation

power under the 1938 Act (i.e., 25 U.S.C. §§ 396a-396g) was a sufficient justification to conclude that no "carryforward" of the clear taxation power possessed by the states under the 1924 Act (i.e., 25 U.S.C. § 398) was intended. Indeed, to emphasize the point, the circuit court opinion quotes (729 F.2d at 1202-1203) from Girouard v. United States, 328 U.S. 61, 69 (1946) as follows:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

It is apparent from this quote that the circuit court opinion at best puts the "cart before the horse." At worst, the quote begs the question of whether or not the taxation authorization of 25 U.S.C. § 398 was superseded or replaced by 25 U.S.C. §§ 396a-396g. The opinion thereby engenders the argument that any power of taxation under the latter statutes would purportedly have to be implied through reliance upon congressional silence. The amici curiae would respectfully submit that the circuit court's reasoning

epitomizes the frustration and confusion that will be created, leading inevitably to future litigation.

The mere statement of the proposition demonstrates its error: it is the implied repeal, abrogation or supersession of a clear and unequivocal prior grant of state taxation power -- rather than the implied creation of a purportedly non-existent taxation power through congressional silence -- that constitutes the real question here.

As specifically pointed out by the dissent in Oklahoma Tax Commission, supra, four Justices of this Court -- Chief Justice Stone, Justice Murphy, Justice Reed and Justice Frankfurter -- shared the view in 1943 (only five years after 1938) that 25 U.S.C. § 398 was still viable and was in no way repealed, abrogated or superseded in such a manner as to render it anything other than what it had been when originally enacted by Congress: a specific and continuing grant to the states to tax as provided therein.

Ironically, the circuit court opinion voices criticism (729 F.2d at 1203) of the State of Montana's

reliance upon an unpublished, informal opinion of the Interior Department (Memorandum, May 4, 1956, M-36345). That opinion held that the taxation authorization of the 1924 Act, 25 U.S.C. § 398, did, indeed, carry forward to apply to mineral leases entered into under the 1938 Act, 25 U.S.C. §§ 396a-396g. The basis for the criticism of the opinion, other than that it was "informal" and "unpublished", was that it was (729 F.2d at 1202):

> "...not contemporaneous with the enactment of the 1938 statute, but rather, occurred 12 years later."

The irony of this lies in the fact that although the Interior Department overruled the 1956 "informal" and "unpublished" opinion in 1977 (Memorandum, November 7, 1977, 84 Int. Dec. 905, 911) -- nearly 40 years after the enactment of the 1938 Act --, the circuit court stated, 729 F.2d at 1203:

> "...[T]he Department [of Interior] repudiated its earlier [1956] interpretation in 1977, see 84 Interior Dec. 905 (1977), in a published and

carefully reasoned opinion that analyzed both statutes and the Department's prior rulings. In 1979, the Department reexamined and adhered to its 1977 position. See 86 Interior Dec. 181 (1979). Under these circumstances, confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage." (Emphasis added)

Nowhere in its opinion does the circuit court explain why it should not defer to the views of four Justices of the United States Supreme Court, expressed in footnote 11 of the dissent in Oklahoma Tax Commission, supra, rendered merely five years after the passage of the 1938 Act. The dissent in that case, moreover, is relied upon not only by the circuit court through citation to Bryan, supra (see 729 F.2d at 1203) but also by Solicitor Krulitz, the author of 84 Int. Dec. 905.

And, in a similar fashion, nowhere in Solicitor Krulitz' opinion is it explained why perhaps the most contemporaneous and authoratative expression of the relationship between the 1924 Act and the 1938 Act, expressed by four former Justices of this Court, is neither mentioned nor distinguished.

Finally, in addition to all of the foregoing, and as the Petitioner State of Montana herein points out (Pet., pp. 23-24), footnote 16 in McClanahan v. Arizona State Tax Commission, supra, as does footnote 11 in the dissent in Oklahoma Tax Commission, supra, references 25 U.S.C. § 398 as being an example of a statute where Congess has specifically sanctioned the application of state taxes upon unallotted tribal lands. The amici curiae do not have specific knowledge of the source of or reason for the inclusion of that example in the footnote. However, they would point out that, pursuant to the request of this Court dated February 22, 1972, the Solicitor General of the United States (not the Solicitor of the Interior Department), filed

in April, 1972, an amicus curiae brief in the McClanahan case, supra. That brief states, p. 4:

> "...[w]hen Congress has wished to extend to the States the right to tax Indians within a reservation it has done so by carefully delimited legislation. Thus 25 U.S.C. § 398 specifically authorizes the States to tax mineral production on unallotted tribal land." (Emphasis added)

Accordingly, the amici curiae would respectfully submit that, at the very least, the failure to discuss footnote 11 of the dissent in Oklahoma Tax Commission, supra, or footnote 16 in McClanahan, supra, by either the circuit court opinion herein or the Interior Department opinion upon which it relies -- 84 Int. Dec. 905 -- constitutes a compelling reason to grant the petition for a writ of certiorari. The only circumstance that can be reasonably expected to evolve in the absence of a full and complete disposition of the issues herein by this Court is more and more confusion, litigation and frustration for all

parties involved, including the states, the Indians and the mining lessees.

If, indeed, it be the opinion of a majority of this Court that the taxation authorization of 25 U.S.C. § 398 has vanished as a consequence of § 7 of the Act of 1938 declaring that "...all Act[s] or parts of Acts inconsistent herewith are hereby repealed," then the only way to finally and dispositively resolve the confusion and turmoil surrounding these issues is to grant the petition for a writ of certiorari and proceed to a full examination of the question. To borrow a phrase from this Court's holding in Girouard, supra, it will be at best a treacherous and confusing future for all concerned unless the issues raised herein are squarely addressed and resolved.

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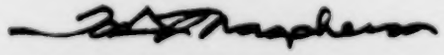

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CERTIFICATE OF SERVICE

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